Briefing Document: Ethical, Legal, and Policy Analysis of Florida Statute §768.21(8)

Prepared for: Florida State Senators/Representatives and Policy Stakeholders

Date: 27MAR25

Subject: Legal Disparities, Medical Malpractice Reform, and Civic Implications of §768.21(8)

In short, the answer lies in achieving a Nash Equilibrium:
Nash Equilibrium describes a decision-making scenario in which no stakeholder can improve their outcome by unilaterally changing their strategy, provided the strategies of others remain unchanged. In the context of medical malpractice reform, a Nash Equilibrium may explain how the stakeholders—surviving family members, physicians and hospitals, insurers, and the State—can adopt strategies (**read about the Michigan Model below**) that are individually rational given the actions of others, even though the collective outcome is suboptimal for each party involved. Reform efforts often stall unless all parties shift their positions simultaneously, making coordination essential to breaking the current impasse.

Stakeholders and Their Goals Regarding the Repeal of FS §768.21(8)

- Families of victims: Seek justice and accountability, emotional closure, and equal access to the courts.
- Physicians: Desire protection from litigation exposure and lower malpractice insurance premiums.
- Insurers: Prioritize risk mitigation and profitability by reducing the volume and cost of claims.
- The State of Florida: Aims to maintain economic stability, ensure access to healthcare, and avoid political disruption.

Over the past 35 years, these interests have remained misaligned, resulting in legislative gridlock and the preservation of the statute despite widely acknowledged inequities.

If subsection (8) is repealed—as many argue justice requires—only the concerns of surviving family members will have been directly addressed in the 2025 legislative session. Physicians, hospitals, and insurers may view the change as a loss of protection, which could potentially heighten their resistance to broader reform. In this event, the State may find itself facing a similar conflict as before—only from the opposite direction. True reform will therefore require not only statutory correction but also structural accommodation that balances justice with stability across all sectors.

I. Introduction: Identifying the Stakeholders and the Path to Equilibrium

The problem I have observed in the effort to repeal Florida Statute §768.21(8) is that the stakeholders are unwilling to listen to each other's point of view. Each side listens only with the intent to argue their perspective, not to understand. In this document, I will outline the problems I have witnessed from all sides and explain why this issue will not be resolved until each side is willing to listen with the intention of understanding and work together towards a common goal. What follows is a list of the four primary stakeholders I have identified in the effort to repeal §768.21(8):

1. The Families

The surviving family members express their desire for accountability, acknowledging that no financial compensation in the form of non-economic damages can bring back their loved one. This is understandable. However, in their pursuit of justice, they have petitioned the legislature to repeal a law that limits their remedies to either financial or injunctive relief. If these family members were to sit down and talk with me, I would ask three questions:

1. **How much financial compensation**, if any, would truly alleviate the pain and suffering after losing a loved one? I believe the answer would be that no amount of money could make that happen. This leaves us with either punishment or accountability, which, by their own words, is what these families are seeking. Maybe these two options are the same thing.
2. **If §768.21(8) is repealed**, would they be willing to allocate a portion of any non-economic damage award to benefit the community, for example, by funding independent autopsies or supporting expert evaluations as mandated by Florida's pre-suit requirements when a hospital refuses to address their concerns about potential negligence?

3. **If the Department of Health were to impose a license revocation or stringent disciplinary actions on the negligent provider once negligence has been substantiated**, would they accept a cap on the damage award in exchange for said accountability?

In cases where negligence is suspected and the hospital or doctor has been uncooperative with the family's inquiries, it is not unreasonable to ask whether the hospital where the death occurred should perform the autopsy. In my view, this creates a conflict of interest, which is why an independent autopsy may be requested. Based on my research while studying the medical malpractice issue in the state of Florida, I have learned that when a questionable outcome occurs, hospitals and doctors are advised by their legal representatives not to discuss the case with anyone. This leads to suspicion and a cover-up on the part of the surviving family members, which forces them to hire an attorney to help them discover what happened to their loved one.

The cycle begins here, and once it starts, allegations begin to fly, legal teams assume a protective posture, and people with limited knowledge of medical practice begin to speculate. These family members venture into a world where they have minimal knowledge or information, without the guidance of medical experts and malpractice attorneys, and start to make assumptions. However, if providers were more open and forthcoming after a negative outcome, these scenarios would have a much smaller chance of becoming adversarial.

2. The Healthcare Providers (Physicians, Nurses, Hospitals, etc.)

These providers operate in a high-risk field, comparable to that of airline pilots or astronauts, where a single mistake can have devastating consequences, both to victims and their surviving family members. Their focus is on delivering quality care, preventing adverse outcomes, and managing malpractice premiums to ensure their chosen profession remains financially viable. While exceptions to this general observation exist, they are rare. When an error occurs, a one-size-fits-all remedy will not suffice. Numerous factors contribute to instances of provider negligence. NASA studies have shown that when an error occurs, it can be shown that several mistakes led to the main event but had gone undetected. This is why each case should be assessed individually, in court, where a jury can decide what is and what is not acceptable in their community.

Even in cases where no negligence is found after an investigation, the community benefits because the issue is aired in public view, the people benefit by seeing that the system works, and our body of law is strengthened. No one can fault a healthcare provider for seeking lower insurance rates. However, this goal can be achieved without infringing on the rights of any specific group of citizens. Doctors can advocate for mandatory malpractice insurance for all physicians in the state, thereby expanding the pool from which payouts are drawn. They can promote more rigorous disciplinary actions against colleagues to achieve a deterrent effect when negligence is established. They can develop a system to report witnessed instances of negligence without fear of retaliation proactively. Most importantly, doctors can take responsibility when negligence occurs and admit to what happened. Numerous studies indicate that when this happens, far fewer families are inclined to file a medical malpractice lawsuit. These families seek an explanation for what happened, expect the provider to take accountability, and wish to know what measures will be implemented to prevent a recurrence.

3. The Insurance Companies

Insurance companies primarily operate to generate profit, which can be achieved in several ways. First, they can increase their revenue by selling more policies. Additionally, they can wisely invest premium income. They can limit their annual payouts by challenging what they consider to be “frivolous claims.” They can also reduce operational costs. While it may seem unreasonable to the average person for the CEO of an insurance company to earn $5 million a year—and perhaps their position demands such a salary—it is a factor to be considered.

Instead of pursuing one or more of these strategies, insurance companies have spent millions of dollars on lawyers and lobbyists to influence lawmakers to oppose the repeal of §768.21(8). Rather than collaborating with the State and the healthcare providers they insure to assist in eliminating the few bad actors, they have instead invested their time and resources into restricting citizens' rights. I cannot ascertain how much money an insurance company might save by addressing the 2% of doctors responsible for 50% of claims payouts. However, I can tell you that if two employees out of every hundred were causing a private company to lose 50% of its profits, they would likely lose their jobs very quickly. As corporate citizens, these companies share a responsibility to help protect their community, similar to how regular citizens are expected to assist police in criminal investigations.

4. The State (All Three Branches)

The State has a stake in this issue because its primary responsibility is to protect the rights of citizens who have agreed to abide by the rules of the social contract. The State must understand the arguments presented when citizens—both individuals and corporations—petition their lawmakers for redress of grievances. The State should gather facts, study relevant questions, and enact legislation that benefits its citizens without infringing on the rights of specific individuals.

It is challenging for a member of the House or Senate to discern what to believe when a lobbyist or provider presents one claim, asserting it as gospel truth, only to be contradicted moments later by another provider or lobbyist claiming the exact opposite. Furthermore, it is difficult for legislators to draw a clear line between the emotions expressed by a family member and the fact that not every unfavorable outcome constitutes medical malpractice. I can tell you from my own experience of talking with dozens of family members over the past five years that very few allegations of medical negligence would ever find their way in front of a jury. As I stated earlier, what most people want after the death of a loved one is answers, not silence. It is the silence of the doctors and hospitals that drives the lawsuits.

It has been 37 years since the State last studied the issue of malpractice premiums leading to a loss of providers. Many lawmakers today rely on outdated data, which is often repeated without verifying its current accuracy and reliability. Many new lawmakers are entirely unfamiliar with this issue, and some have not taken the time to study it in depth. They will listen to the story of a surviving family member, recognize the injustice, and never follow through to hear all sides. Or, they will listen to a lobbyist and agree that the State cannot afford to lose any more doctors, then claim a compelling interest in restricting the rights of some citizens. Many lawmakers do not understand the failures of the Department of Health (DOH) and the Agency for Health Care Administration (AHCA) to hold providers accountable as personally as family members do. Perhaps it is time to establish another task force to reexamine this issue, especially now that we understand doctors are not leaving the state due to unaffordable insurance premiums. (See the latest DOH survey)

Conclusion

The essence of this matter is that unless each stakeholder takes the time to listen to the concerns of all parties involved and weighs what they hear

against the benefits of living in a civil society, progress cannot be achieved. Families need to recognize that if money is not a priority and holding the provider accountable is, they should uphold their principles and balance their needs with those of the community. Many have expressed a desire to use their personal tragedy as a means to prevent other families from experiencing what they have. Providers must accept responsibility for their actions, even when those actions cross the line into medical negligence. Insurance companies should seek ways to minimize their losses without expecting the citizens to shoulder that burden. And finally, the State must fulfill its duty to protect the rights of citizens, even when corporate interests are at stake.

True reform will only be achieved when all parties abandon entrenched narratives and engage with one another as co-citizens bound by mutual obligation. If each stakeholder adjusts their incentives and recognizes the broader moral costs of inaction, a new equilibrium—fair, stable, and just—can be established.

An overview of the Michigan Model

At its core, the Michigan Model is a framework for responding to medical errors that emphasizes transparency and early intervention. Based on NASA's "Systems Error" approach to problem-solving, when a healthcare institution recognizes an error, it immediately discloses the mistake, offers an apology, and negotiates a fair settlement. Subsequently, a root-cause analysis is conducted to identify the cause of the issue, and systemic changes are implemented to prevent recurrence. These steps are not merely suggestions; they are statutory requirements. This model has significantly reduced both litigation costs and preventable harm. (**See more about the *Michigan Model at the end of this paper**)

I. Overview

This document presents an integrated legal, ethical, and policy analysis of Florida Statute §768.21(8), which restricts certain surviving family members—primarily adult children and parents of deceased adult patients without a spouse or minor children—from recovering non-economic damages in cases of medical negligence resulting in death. It highlights the inequities embedded in the statute, the consequences for justice and public safety, and explores principled reform options inspired by proven models in other states and industries.

II. Ethical and Legal Concerns

1. **Unequal Legal Treatment**
   FS §768.21(8) draws arbitrary distinctions among survivors based solely on family structure, allowing some to recover noneconomic damages while denying others the same right. This implies that certain lives are considered legally less valuable, which undermines the principle of equal justice under the law.

2. **Accountability and Professional Standards**
   By insulating healthcare providers from the full civil consequences of their actions, the statute diminishes the deterrent effect of malpractice claims and weakens professional accountability. This erodes public trust in both the medical profession and the legal system.

3. **Denial of Jury Participation**
   By preventing certain claims from ever reaching a jury, §768.21(8) excludes eligible Floridians from fulfilling their civic duty to serve as jurors in those matters—thereby obstructing one of the most fundamental instruments of democratic oversight. While voting is the citizen's first means of engaging with government, and petitioning for redress of grievances is the second, jury service stands as their final check on the conduct of both government and private actors within their community. For the State to curtail this responsibility is to violate the Social Contract upon which its legitimacy rests.

4. **Erosion of Democratic Values**
   Restricting access to courts by barring specific damage awards and excluding survivors from the right to petition for redress contradicts the letter and the spirit of the Florida and U.S. Constitutions. It undermines public confidence in the impartial administration of justice.

5. **Neglect of Modern Family Realities**
   The law fails to account for evolving family structures and emotional bonds, instead relying on outdated notions of whose grief and loss are considered legitimate in the eyes of the law.

III. Systemic Dysfunction in Malpractice Policy

1. **Cross-Purposed Stakeholders**
    - Families seek justice, equality, and closure.
    - Physicians seek affordable premiums.
    - Insurers seek profitability.
    - The State seeks public safety and economic balance.

These conflicting interests have created legislative inertia, sustaining a flawed status quo.

2. **Financial vs. Moral Justice**
   The statute's defenders often reduce the issue to a matter of money. However, for many affected families, the primary grievance is the denial of moral accountability and institutional oversight.

3. **Barriers to Meritorious Claims**
   The FS §766 pre-suit process requires expert review, which necessitates the involvement of legal counsel. FS §768.21(8) prevents families from hiring an independent medical expert to help determine if negligence occurred, as the statute requires an attorney. Attorneys, however, have no incentive to take cases where noneconomic damages are not recoverable, effectively silencing otherwise legitimate claims. This is a legal Catch-22—an unwinnable condition where fulfilling one requirement makes meeting another impossible. Alternatively, it provides double protection for healthcare providers, whether intentional or not.

4. **Failure to Address Repeat Offenders**
   Roughly 2% to 4% of doctors are responsible for approximately half of all malpractice payouts. Yet, current policies shield rather than sanction these individuals, increasing risk to patients and legal exposure.

5. **Insurance Litigation Priorities**
   Insurers frequently spend millions of dollars defending known repeat offenders rather than promoting systemic risk reduction. A more rational model would realign incentives around safety and prevention, helping to achieve a Nash Equilibrium.

IV. Reform Proposals and Alternative Models

1. **The "Michigan Model"**
   Emphasizes early error disclosure to the family by the hospital or doctor, apologies to the family, a quick and fair damage settlement, a subsequent root-cause analysis (RCA) to identify the problem(s) that led to the event, and systemic corrections to prevent similar events in the future. This Model has been proven to reduce litigation and improve patient outcomes.
2. **NASA-Inspired Safety Framework**
   Applies principles from aviation safety:
   - Standardized protocols
   - Non-punitive error reporting systems
   - Root-cause investigations
   - Data-driven risk prevention
3. **Practical Reform Measures**
   - Repeal FS §768.21(8) to restore equal access to justice.
   - Conduct an in-depth review and investigation of the Florida Department of Health (DOH) to determine why so few healthcare licensees are held accountable, and why Florida's Three Strikes Law is rarely implemented. *As an aside, in my research, I discovered that one Florida physician had 19 strikes against him, yet he continued to practice. I uncovered this information on the DOH website*. Once these issues have been corrected, expand oversight and disciplinary actions, including fines for repeat offenders, through the DOH and the Agency for HealthCare Administration (AHCA).
   - Utilize more substantial disciplinary fines through the medical and nursing licensing boards to support and fund public safety initiatives, such as medical expert review and independent autopsies following substantiated negligence.
   - Demand, through statute, that hospitals and doctors implement a systems review and show corrective measures were taken when negligence has been substantiated.

V. Constitutional and Philosophical Foundations

Drawing from Social Contract Theory and American founding principles:

- **Consent of the Governed:** Government derives its authority from citizens, who retain the right to challenge or reform unjust laws. This is accomplished through voting, petitioning for a redress of grievances, and through jury participation.
- **Trial by Jury:** As emphasized in the Declaration of Independence and Florida's Constitution, access to jury trials is a fundamental safeguard against tyranny and injustice, and it requires that all citizens, including corporate entities, be held accountable by the community.
- **Democratic Participation:** Jury service and access to courts are mechanisms through which citizens exercise oversight of State power and hold their fellow citizens accountable.
- **Moral Responsibility of Lawmakers:** By upholding laws that arbitrarily exclude certain citizens, the legislature risks violating both the letter and the spirit of its constitutional obligations, leading to a decline in trust in government.

VI. Conclusion and Call to Action

Florida Statute §768.21(8) represents a systemic failure to deliver equal justice and uphold democratic values. Reform is not only a legal necessity but a moral imperative. I strongly urge Lawmakers to:

- Immediately repeal FS §768.21(8), which will restore access to courts for all families affected by medical negligence.
- Implement reforms rooted in proven safety models such as the Michigan Model.
- Hold the DOH and AHCA accountable to their statutory duties.

Inaction perpetuates inequality. Legislative courage and public accountability can restore Florida's commitment to justice and the common good.

***The Michigan Model**

The Michigan Model is an innovative approach to handling medical malpractice claims, developed by the University of Michigan Health System (UMHS). It emphasizes transparency, patient safety, and early resolution of disputes. Below is an outline of its key features and impact:

Key Features of the Michigan Model

1. **Disclose, Apologize, and Offer (DAO) Approach**:
    - The model promotes open disclosure of medical errors to patients.
    - Healthcare providers apologize for mistakes and offer fair compensation when appropriate, aiming to resolve disputes without litigation[1][5].
2. **Six-Month Cooling-Off Period**:
    - Before filing a lawsuit, patients must issue a "notice of intent," allowing both parties six months to investigate and negotiate.
    - This period fosters dialogue between the healthcare provider and the patient, often resolving cases without court involvement[5].
3. **Proactive Investigation**:
    - UMHS uses the cooling-off period to thoroughly investigate complaints, determine liability, and engage with patients or their attorneys[5].
4. **Self-Insurance**:
    - The UMHS is self-insured for malpractice claims, which allows flexibility in managing cases and implementing the model effectively[5].

Benefits of the Michigan Model

1. **Reduction in Lawsuits**:
    - The number of malpractice claims filed against UMHS has significantly decreased since adopting the model[1][5].
2. **Lower Liability Costs**:
    - By resolving claims faster and avoiding prolonged litigation, liability costs have declined[1].

3. **Improved Patient Safety**:
    - Transparency about errors helps identify systemic issues, leading to improvements in medical practices and patient safety protocols15.
4. **Enhanced Trust and Transparency**:
    - Open communication fosters trust between patients and healthcare providers, reducing adversarial relationships15.

National Impact

The success of the Michigan Model has inspired other hospitals across the U.S. to adopt similar practices. The Agency for Healthcare Research and Quality (AHRQ) even developed the CANDOR Toolkit based on elements of this model to encourage nationwide implementation5.

In summary, the Michigan Model represents a shift from defensive medicine to a more collaborative and transparent approach in addressing medical malpractice claims. Its focus on early disclosure, fair compensation, and systemic improvement has proven effective in reducing litigation while enhancing patient safety.

Respectfully submitted by:

Philip Glickstein
Personal Representative for the Wynelle Glickstein Estate
Philip@legalizednegligence.com
www.legalizednegligence.com